

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

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**August 5, 2005**

*IN RE: Petition of ITC^DeltaCom  
Communications, Inc. for Mediation and  
Dispute Resolution*

) T.R.A. DOCKET ROOM

) Docket No.: 05-00174

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**RESPONSE OF ITC^DELTACOM COMMUNICATIONS, INC. TO BELL SOUTH  
TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS**

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ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") submits the following response to the Motion to Dismiss filed by BellSouth Telecommunications, Inc. ("BellSouth").

**Background**

On July 1, 2005, ITC^DeltaCom filed the above-captioned Petition for "Mediation and Dispute Resolution" asking the Tennessee Regulatory Authority to mediate or, in the alternative, open a contested case proceeding to resolve a number of disputed issues between ITC^DeltaCom and BellSouth. The Petition was filed pursuant to sections 11 and 16.4 of the parties' current interconnection agreement, which was approved by the TRA on August 10, 2001 (Docket 99-00430). Section 11 provides that "either Party, may petition [the Authority] for a resolution" of a dispute.<sup>1</sup> The disputed issues listed in the Petition arise as the result of regulatory and legal decisions which have materially affected the terms of the parties' agreement and require that these terms be renegotiated. Section 16.4, which covers changes in applicable law, states that if the parties are unable to negotiate

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<sup>1</sup> Section 11 states, "Except as otherwise stated in this Agreement, the Parties agree that if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, either Party may petition the Commission for a resolution of the dispute "

new terms within ninety days, the parties may ask the Authority to resolve their dispute pursuant to Section 11.<sup>2</sup> This petition was filed two weeks after the ninety day period expired.

### **Argument**

Rather than responding to the substantive issues raised in the Petition, BellSouth filed a Motion to Dismiss on July 27, 2005. BellSouth does not dispute that, under the parties' interconnection agreement, ITC^DeltaCom has a contractual right to seek relief from the Authority in order to resolve disputed issues; nor does BellSouth dispute that the Authority has the power and duty, under both state and federal law, to address the issues raised in the Petition. BellSouth simply contends that this Petition should be dismissed because many, but not all,<sup>3</sup> of the issues raised in the Petition are also pending before the Authority in the generic "change-of-law" docket (No. 04-00381) and, therefore, this additional proceeding is "inefficient" and "inconsistent" with the purpose of the generic docket.

BellSouth's Motion has no legal basis. ITC^DeltaCom clearly has the right to get these issues resolved, one way or another. If some are resolved in next month's generic proceeding, in which ITC^DeltaCom intends to participate actively, there is no need for a second proceeding to address the same questions. If, on the other hand, the generic proceeding does not reach all the issues raised by ITC^DeltaCom, further negotiations and, it seems likely, a hearing on this Petition will be required.<sup>4</sup>

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<sup>2</sup> Section 16.4 states, "In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of ITC^DeltaCom or BellSouth to perform any material terms of this Agreement, ITC^DeltaCom or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in Section 11."

<sup>3</sup> The ITC^DeltaCom Petition lists forty-three issues. According to BellSouth, thirty-three of those issues either mirror issues raised in Docket 04-00381 or "are subsumed" within those issues. BellSouth Motion at footnotes 5-6. That leaves ten issues which, even BellSouth acknowledges, are unique to the Petition.

<sup>4</sup> Because Tennessee is scheduled to begin hearings on September 12 in the change-of-law docket, ITC^DeltaCom does not believe it practical to proceed with this Petition until after the hearing in Docket 04-00381. As soon as the hearing is over, however, ITC^DeltaCom proposes that the TRA convene a pre-hearing conference in this docket to discuss what issues remain in the Petition, clarify the parties' positions, and establish an expeditious procedural schedule.

In the Petition, for example, ITC^DeltaCom has raised the “commingling” issue (Issue 12) which corresponds to Issue 13 in the generic proceeding.<sup>5</sup> In the Petition, ITC^DeltaCom submitted a confidential attachment (Exhibit B) showing fourteen diagrams of loop and transport service arrangements. ITC^DeltaCom believes these will be the most common commingling requests made by ITC^DeltaCom and seeks specific contract language and pricing on these arrangements. The generic docket does not, of course, address this kind of proprietary, company-specific request, nor could it practically do so. On the other hand, it is critical to ITC^DeltaCom that its interconnection agreement include rates, terms, and conditions for these commingling arrangements. Similarly, ITC^DeltaCom has proposed company-specific contract language on other issues which may or, more likely, may not be addressed in the generic docket.

To insure that all of these issues are resolved in a timely fashion, ITC^DeltaCom filed this Petition for Mediation and Dispute Resolution. Had ITC^DeltaCom not filed this Petition, listing all the disputed issues that have arisen from the change-of-law negotiations in accordance with sections 11 and 16.4 of the parties’ interconnection agreement, BellSouth might argue that ITC^DeltaCom had waived its rights to have these issues resolved by the Authority. That was a risk ITC^DeltaCom did not wish to take.

More importantly, ITC^DeltaCom must have new contract language in place to be able to provide service after March 11, 2006, when traditional UNE-P service is no longer available. BellSouth has already indicated to another state commission that BellSouth believes it “highly unlikely, if not a certainty” that the generic proceedings now scheduled throughout the region will be

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In other states, where time allows, ITC^DeltaCom intends to proceed (and is proceeding) with commission-ordered mediation and litigation over the issues raised in the Petition before the hearings in the change-of-law proceedings.

<sup>5</sup> BellSouth’s Motion mistakenly equates ITC^DeltaCom Issue 12 with Issue 14 in the generic docket (Motion at footnote 5). There may well be other errors in BellSouth’s attempt to correlate the two dockets but, for purposes of this response, ITC^DeltaCom has not done a detailed comparison. As stated above, even BellSouth concedes that there are ten issues raised in the Petition that are not addressed at all in the generic docket.

completed in time to have new ICAs in place by March 11, 2006.<sup>6</sup> That is another risk that ITC^DeltaCom cannot afford to take. Therefore, the company has filed this Petition, as it has the right to do under its ICA, to insure that, regardless of the timing of the generic docket, ITC^DeltaCom has an alternative proceeding in which to amend its ICA prior to the FCC's deadline.<sup>7</sup>

State regulators, including this Authority, have used generic proceedings to address issues common to multiple interconnection agreements, such as the establishment of TELRIC-based UNE rates. (See 47 U.S.C. §252(g), recognizing that states may consolidate proceedings in certain circumstances.) On the other hand, the federal Telecommunications Act also states that BellSouth's offering of generally available terms and conditions to all competitors "shall not relieve a Bell operating company" of its duty to engage in bilateral negotiations with individual carriers and to enter into bilateral agreements with each such carrier.<sup>8</sup> See 47 U.S.C. §252(f)(5). In this case, the establishment of a generic proceeding does not and cannot relieve BellSouth of its contractual obligations to engage in bilateral negotiations with ITC^DeltaCom, which are continuing,<sup>9</sup> nor does it release BellSouth from the obligation to participate in this docket.

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<sup>6</sup> See "BellSouth Response to ITC^DeltaCom Motion for Clarification," filed July 15, 2005, in Docket P-500, Sub 18 (N C Public Service Commission), at 3, emphasis added.

<sup>7</sup> Given the parties uncertainty over the outcome of the change-of-law proceedings and the possibility that new agreements will not be in place by March, 2006, one would assume that the parties could agree to an interim contract which would be subject to a true-up based on the outcome of the change-of-law dockets and the adoption of new interconnection agreements. BellSouth, however, has rejected ITC^DeltaCom's offer of an interim agreement, evidencing that it is BellSouth's plan to force the CLECs to sign commercial contracts in order to be able to continue providing service to mass market customers after March 11, 2006. Now that BellSouth has successfully argued that the provisions of the TRRO eliminating UNE-P, but only those provisions, are "self-effectuating," it is in BellSouth's best interest that litigation over other issues, such as the establishment of 271 rates and enforcement of BellSouth's commingling obligation, drag on as long as possible.

<sup>8</sup> The TRA denied a similar request filed by BellSouth in 2002, finding that to remove issues to a generic proceeding would deny both parties the right to be heard on the specific issues in question, which were more appropriately handled in a bilateral proceeding. Docket 03-00119, Initial Order issued August 20, 2003.

<sup>9</sup> As noted in the Petition, ITC^DeltaCom believes these negotiations would be greatly facilitated by the presence of a TRA Director or Staff member acting as a mediator. BellSouth, however, adamantly refuses to consider this less expensive and more efficient alternative to litigation. See footnote 7, supra.

Finally, BellSouth's Motion states that certain issues listed in the Petition may not be negotiated by the parties nor addressed by the TRA in this proceeding because those issues were not impacted by any change in law.<sup>10</sup> BellSouth's argument, however, is at odds with its position during the negotiations it requested under Section 16.4 of the ICA. For example, Petition Issue 20, which relates to the interval for "hot cuts," may not be the subject of any change of law. However, BellSouth, not ITC^DeltaCom, brought this issue to the "change in law" negotiations. BellSouth refused to stand by the current contract language concerning "hot cuts" and proposed new language to ITC^DeltaCom. If BellSouth had not sought such new language during the dispute resolution negotiations, the "hot cuts" issue would not be included in the Petition. Similarly, with regard to Issue 27 (conversion of resold services to other services), BellSouth sought during negotiations to strike language from the agreement even though ITC^DeltaCom contended the issue was not clearly impacted by any change of law. ITC^DeltaCom would be pleased to keep language on both of these issues. There is no apparent change in law affecting these issues. Nonetheless, during the 90-day negotiation period, BellSouth sought to change the language in the parties' ICA covering these issues. Although ITC^DeltaCom did not believe the contract language relating to these and other similar issues was effected by any change in law, BellSouth left ITC^DeltaCom with no other choice but to include these issues in the Petition.

### **Conclusion**

There is no legal basis to grant BellSouth's Motion to Dismiss. ITC^DeltaCom is entitled as a matter of law to bring these issues before the Authority and to have them resolved, if not through mediation then in a contested case proceeding. As soon as the September hearing in the generic docket is complete, ITC^DeltaCom asks that the Authority convene a pre-hearing conference to discuss and


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<sup>10</sup> BellSouth's Motion to Dismiss at 6. BellSouth's Motion is nonspecific on this point, but generally states that, "DeltaCom cannot simply change terms of its existing agreement that it does not like and that do not arise from changes in law . . ."

clarify the remaining issues in the Petition and establish a schedule to resolve those issues as soon as practical.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing is being forwarded via U.S. mail, to:

Guy Hicks  
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333 Commerce Street  
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on this the 5<sup>th</sup> day of August, 2005.

  
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Henry M. Walker